FCC 96-122

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	MM Docket No. 92-266
and Competition Act of 1992:	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	CS Docket No. 96-60

ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 21, 1996 Released: March 29, 1996

By the Commission:

Comment Date: May 15, 1996
Reply Comment Date: May 31, 1996

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I. INTRODUCTION AND BACKGROUND

1. In this *Order on Reconsideration and Further Notice of Proposed Rulemaking* ("*Order and Further Notice*"), we address ten petitions for reconsideration[1] of the cable television commercial leased access rules adopted in our *Report and Order* in MM Docket 92-

[1] The parties who filed petitions for reconsideration, oppositions and replies in this proceeding which relate to leased access are listed in Appendix A hereto.

266,[2] pursuant to the provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[3] and request comment on many of the issues involved.

2. The statutory framework for commercial leased access was established by the 1984 Cable Act[4] and amended by the 1992 Cable Act. The 1984 Cable Act established commercial leased access to assure access to the channel capacity of cable systems by parties unaffiliated with the cable operator who want to distribute video programming free of the editorial control of the cable operator.[5] Channel set-aside requirements were established in proportion to a system's total activated channel capacity, in order to "assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."[6] A cable system operator was permitted to use any unused leased access channel capacity for its own purposes, until such time as a written agreement for a leased channel use was obtained.[7] Each system operator subject to this requirement was to establish "the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[8]

3. The 1992 Cable Act amendments to Section 612 broadened the statutory purpose to include "the promotion of competition in the delivery of diverse sources of video programming," and the Commission was provided with expanded authority: (1) to determine the maximum reasonable rates that a cable operator may establish for leased access use,

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[2] *Report and Order and Further Notice of Proposed Rule Making*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993) ("*Rate Order*").

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.* (1992). The 1992 Cable Act amends Title 6 of the Communications Act, 47 U.S.C. § 521 *et seq.*

[4] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 *et seq.*

[5] Communications Act of 1934, as amended , ("Communications Act") § 612(b), 47 U.S.C. § 532(b). The House Committee stated that its "overriding goal in adopting this section is divorcing cable operator editorial control over a limited number of channels. . . . [I]t is not the cable operator's exercise of any economic power, but his exercise of editorial control, which is of concern to the Committee." House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) (hereinafter "1984 House Report") at 50.

[6] Communications Act, §§ 612(a), 612(b)(1), 47 U.S.C. §§ 532(a), 532(b)(1).

[7] Communications Act, § 612(b)(4), 47 U.S.C. § 532(b)(4).

[8] Communications Act, § 612(c)(1), 47 U.S.C. § 532(c)(1).

including the rate charged for the billing of subscribers and for the collection of revenue from subscribers by the cable operator for such use; (2) to establish reasonable terms and conditions for leased access, including those for billing and collection; and (3) to establish procedures for the expedited resolution of leased access disputes.[9] The legislative history of the 1992 amendments expresses concern that some cable operators may have established unreasonable terms or may have had financial incentives to refuse to lease channel capacity to potential leased access users based on anticompetitive motives, especially if the operator had a financial interest in the programming services it carried.[10]

4. In the *Rate Order* in this docket, the Commission established initial regulations to implement the leased access provisions of the 1992 Cable Act.[11] The Commission adopted the highest implicit fee formula as the method to set maximum reasonable rates, and adopted various standards governing access terms and conditions, tier placement, technical standards for use, technical support, security deposits, conditions based on program content, and requirements for billing and collection service. Each of these is discussed in the appropriate sections below. Procedures for the expedited resolution of disputes were also established. In the *Rate Order*, the Commission also determined that leased access requirements were intended to apply to all systems regardless of the "effective competition" test that governs basic service tier ("BST") and cable programming service tier ("CPST") rate regulation.[12]

5. In the *Rate Order*, the Commission stated, however, that, given the small number of comments received relating to leased access, "the rules we adopt should be understood as a starting point that will need refinement both through the rulemaking process and as we address issues on a case-by-case basis."[13] The Commission stated that it was aware that leasing issues may need to be addressed in quite different fashions depending upon the nature of the service involved -- whether the lease is for a pay channel, an advertiser-supported channel intended for wide distribution, a channel for a narrow commercial purpose

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[9] Communications Act, § 612(c)(4)(A)(i), (ii), (iii), 47 U.S.C. § 532(c)(4)(A)(i), (ii), (iii).

[10] House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) (hereinafter "1992 House Report") at 39.

[11] The Commission's rules governing commercial leased access are located at 47 C.F.R. §§ 76.701, 76.970, 76.971, 76.975 and 76.977.

[12] *Rate Order*, 8 FCC Rcd at 5936-5937, ¶ 492. The BST is defined as that tier of cable service which includes the local broadcast signals and PEG channels, and may include any additional programming services the operator chooses to include. CPST includes all video programming not included in the BST and for which the operator does not charge the subscriber on a per-program or per-channel basis. *Id.* at 5637, ¶¶ 3-4.

[13] *Rate Order*, 8 FCC Rcd at 5936, ¶ 491.

not relevant to the wide body of cable subscribers, or for a single program or series of programs. Thus, the Commission stated that it was not at that time attempting to resolve comprehensively all the issues potentially involved, many of which could better be resolved in a more specific concrete factual setting.

II. SUMMARY

6. Cable operators and leased access programmers agree that relatively little leased access capacity is being used by unaffiliated programmers. They disagree on the reason for the lack of leased access programming. Programmers claim that the Commission's current maximum rate-setting mechanism, the highest implicit fee formula, results in rates which are prohibitively high, which makes leased access unaffordable to most programmers. In contrast, operators claim that the demand for leased access is weak regardless of the leased access rate, because, at least in part, programming production costs are high. Given these opposing views, we are re-examining the highest implicit fee formula from an economic perspective. The Commission believes that if the maximum rate for leased access is reasonable, the corresponding amount of leased access demand will also be reasonable.

7. The Commission tentatively concludes that the highest implicit fee formula is likely to overcompensate cable operators and does not sufficiently promote the goals underlying the leased access provisions. First, we believe that the highest implicit fee allows double recovery of subscriber revenues by the operator. These revenues may be recovered once from the subscriber (included in the tier charge) and again from the programmer (included in the implicit fee).

8. Second, we are concerned that the highest implicit fee allows an operator to charge a leased access programmer a fee based on the channel with the highest markup over programming costs (i.e, the highest implicit fee). Because the implicit fee for many, if not most, non-leased channels is by definition less than the highest implicit fee, the operator is willing to accept less than the highest implicit fee from non-leased access programmers. Charging the leased access programmer the highest implicit fee therefore allows the operator to set a higher rate than it accepts on non-leased access channels. Third, the Commission believes that the highest implicit fee is not based on the reasonable costs that leased access programming imposes on operators.

9. Given these limitations of the highest implicit fee, the Commission is proposing an alternative that we believe may better promote the goals of leased access. Under our proposed approach, the maximum rate for leased access would depend on whether or not the cable operator is leasing its full statutory set-aside requirement. When the full set-aside capacity is not leased to unaffiliated programmers, the maximum rate would be based on the operator's reasonable and quantifiable costs (i.e, the costs of operating the cable system plus the additional costs related to leased access), including a reasonable profit. The operator would be allowed to continue to use subscriber revenues (including the subscriber revenues associated with leased access channels) to offset the costs of the cable system. In addition,

the operator would be allowed to charge the leased access programmer to cover the reasonable costs of bumping channels to accommodate leased access programmers. The operator would also be permitted to charge part-time leased access programmers any additional costs associated with negotiating and administering part-time leased access programming contracts. In our view, this approach would result in a rate that would better promote the statutory objective of diversity by encouraging unaffiliated programmers to lease the channel capacity. The purpose of the cost formula is not, however, to lower leased access rates.

10. On the other hand, we tentatively conclude that once the operator has met its set-aside requirement, the cost-based maximum rate could be replaced by a market rate. (Because the cost-based maximum rate may be replaced with a market rate, we refer to this proposed approach as the cost/market rate formula.) The operator could negotiate higher rates as long as its set-aside requirement continues to be met. We believe that market rates will most effectively determine which programmers should receive leased access on the system when the operator's set-aside is satisfied. Within the leased access market, those programmers who are able to pay the most for channel capacity would presumably be able to acquire the set-aside channels. The higher price that some leased access programmers may offer to pay for the channel capacity reflects the greater ability and willingness of consumers to pay for the programming to be carried on each of these channels. Thus, relying on market prices to allocate channel capacity provides consumers with an efficient mechanism to communicate their preferences about which leased access programming should be carried by the operator.

11. We recognize that market rates may rise above operators' costs; such prices, however, are the result of competition among unaffiliated programmers to use the statutory leased access channel capacity. We believe that, so long as the operator is accommodating leased access to the full extent required by Congress and Section 612, any price increase would be reasonable. After all, under our proposal, the operator cannot charge market rates if the number of channels leased falls below the number designated by the statute. Thus, a higher rate would reflect excess demand by programmers for the operator's statutory channel capacity.

12. We tentatively conclude that this cost/market rate formula represents a pricing scheme that would establish a maximum reasonable rate without placing an unreasonable financial burden on operators. It would not guarantee that leased access programming would increase. If the cost formula is adopted and does not increase the demand for leased access, we do not believe at this time that further modification of the cost formula would be appropriate. With the possible exception of a rate for not-for-profit programmers, any maximum reasonable rate formula that we adopt, including the proposed cost formula, will not provide a subsidy for leased access programmers.

13. Because our proposed cost/market rate formula is fundamentally different from our current implicit fee formula, we do not adopt the cost/market rate formula at this time. Instead, we seek comment on the issues raised by our proposal. Given our concerns about the current highest implicit fee formula, we expect to act on the comments received in response to

this *Further Notice* as expeditiously as possible. In addition to proposing to modify the maximum rate formula, the Commission: (a) solicits comment on whether to provide preferential treatment for not-for-profit programmers requesting leased access; (b) tentatively concludes that leased access programmers have a right to be placed on a tier that most subscribers actually use; and (c) proposes to streamline its dispute resolution procedures. The Commission has also reconsidered several other issues relating to leased access, and, where appropriate, this *Order* sets forth rules regarding these issues. For example, we amend our rules to clarify that operators must provide certain leased access rate and channel availability information to prospective leased access programmers within seven business days of such programmers' request.

III. ORDER ON RECONSIDERATION

A. Maximum Rate Formula

1. Background

14. As indicated above, Section 612 of the Communications Act directs the Commission to determine the maximum reasonable rates that a cable operator may impose for leased commercial access.[14] Previously, the Commission adopted rules that base the maximum rate on an "implicit" fee paid by non-leased access program services that are being distributed. In the non-leased access context, cable system operators generally receive a payment from subscribers and pay contractual license fees to programmers for the channels the operators distribute. The differences between these dollar amounts may be thought of as the implicit fees that the programmers pay to have their services distributed to subscribers. The Commission determined that the implicit fee is the price per channel each subscriber pays the operator minus the amount per subscriber the operator pays the programmer. Section 76.970(c) of the Commission's rules provides that this difference is multiplied by the percentage of subscribers able to receive the unaffiliated programmer's service. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).[15] Section 76.970(d) of the rules states that maximum rates for shorter periods of time can be calculated by prorating the monthly maximum rate.[16]

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[14] Communications Act, §§ 612(c)(4)(A)(i), 612(c)(4)(B), 47 U.S.C. §§ 532(c)(4)(A)(i), 532(c)(4)(B).

[15] 47 C.F.R. § 76.970(c). As discussed below in Section III.A.3.c., Section 76.970(c) states the implicit fee calculation incorrectly and we will modify the language of the rule so that it reflects how the formula is used to compute the rate.

[16] 47 C.F.R. § 76.970(d).

15. This formula for the maximum rate was intended to avoid a burdensome "rate base, rate-of-return" type of rate calculation.[17] A rate could be derived based on a simple calculation using as inputs only subscriber rates and programming contract prices. The highest implicit fee calculation was intended to avoid existing programming services migrating to leased access channels in a way that would not benefit subscribers or "diverse" entities seeking leased access.

16. Under our current rules, the maximum rate is the highest of the implicit fees charged any unaffiliated programmer within the same programmer category.[18] Cable operators are required to calculate the highest implicit fee for each of the following programmer categories: (a) those charging subscribers directly on a per-event or per-channel basis; (b) those using a channel for more than 50 percent of the time to sell products directly to customers (e.g., home shopping networks, infomercials, etc.); and (c) all others.[19] These three categories were intended to recognize that leasing issues may need to be addressed in quite different ways depending on the nature of the service involved.[20] Under the rules, cable operators are required to calculate annually the maximum rates for each programmer category based on the contracts with unaffiliated programmers in effect in the previous calendar year. Operators are further required to provide rate schedules to prospective programmers upon request.[21]

17. The implicit fee was intended to recover only the value of the channel capacity and not any fees paid by or to the operator for other services, such as billing and collection, marketing, or studio services.[22] The *Rate Order* further concluded that the resulting rates "will not adversely affect the operation, financial condition or market development" of cable systems and will enable commercial leased access to become the source of program diversity and competition to the cable operators that Congress intended it to be.[23]

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[17] *See Rate Order*, 8 FCC Rcd at 5952, ¶ 522.

[18] 47 C.F.R. § 76.970(b).

[19] 47 C.F.R. § 76.970(f).

[20] 8 FCC Rcd at 5936, ¶ 491.

[21] 47 C.F.R. § 76.970(d) - (e); *see also Rate Order*, 8 FCC Rcd at 5951, ¶ 520.

[22] *Rate Order*, 8 FCC Rcd at 5949-5950, ¶¶ 515, 518.

[23] *Id.* at 5951, ¶ 519; *see also* 47 U.S.C. § 532(c)(1).

2. Petitions

18. The majority of cable operators that filed pleadings in this reconsideration proceeding assert that the highest implicit fee approach is fair when it is applied to full-time channel leasing, although some operators challenge adoption of the highest implicit fee formula on the grounds that the resulting rates may not allow operators to recover all of their costs and do not account for the value of services to subscribers.[24]

19. The programming interests and those representing existing and potential leased access channel users seeking reconsideration, however, generally contend that the highest implicit fee produces rates that are prohibitively high. The Center for Media Education, et al. ("CME"), states that application of the highest implicit fee formula defeats the statutory purpose of promoting diversity and competition. According to CME, the highest implicit fee instead simply mirrors the cable industry's current monopsony rates. CME contends that there is no evidence that cable operators need such rates in order to maintain financial health. Leased access programming will, according to CME, add value to the operator's system, thus producing revenues for the operator through increased penetration in addition to the payments received from leased access channel lessees.[25] CME urges the Commission to establish maximum rates below the average implicit fee.[26] Similarly, Videomaker Magazine ("Videomaker") asks that the Commission consider setting maximum rates at the average implicit fee. Videomaker asserts that such a methodology "has a better chance of fostering the new programmers Congress sought to encourage."[27] Videomaker also states that "[s]ome would even argue that the [rate] ceiling should be set with the production of the *lowest* implicit value in the category to give new producers the greatest competitive opportunity."[28]

20. Paradise Television Network, Inc. ("Paradise"), a leased access programmer, states that application of the highest implicit fee formula to a full-time channel lease produces a maximum rate that does not allow a programmer to compete for advertising revenues. According to Paradise, the high lease rate requires advertiser-supported programmers to

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[24] *See, e.g.*, Booth American Company, et al. ("Booth") Petition at 45; Comcast Cable Communications, Inc. ("Comcast") Petition at 19; Time Warner Entertainment Company, L.P. ("Time Warner"), Petition at 34. In addition, several cable operators complain that the highest implicit fee results in part-time rates that are too low. Part-time rates are discussed below in Sections III.B. and IV.B.

[25] CME Petition at 10.

[26] CME Petition at 2; CME Reply at 3.

[27] Ex Parte Letter to JoAnn Lucanik, Federal Communications Commission, from Matt York, Publisher of Videomaker/Leased Access Report (February 10, 1994) at Attachment at 1.

[28] *Id.* at 1-2.

charge higher advertising rates to cover the cost of the lease, which turns advertisers away from the leased access programming. Paradise proposes that the Commission mandate a fixed maximum rate of $.30 per subscriber per month, at least for advertiser-supported programmers. Paradise estimates that this figure is approximately the "break-even" point for a leased access user and that it would not adversely affect cable operators who, according to Paradise, have little if any overhead associated with carrying the leased access signal.[29] A Spanish language leased access programmer, SUR Corporation ("SUR"), states that deriving leased access rates from the most commercially appealing programming is not likely to result in diverse programming. SUR also questions whether the Commission's current formula recognizes that SUR's audience is only 15 percent of the general audience. SUR believes it should not have to pay the same rates as other premium services because its potential audience is much smaller.[30] Community Broadcasters Association ("CBA"), filing on behalf of the low power television station industry, submits that cost should be the fundamental basis for establishing rates for commercial leased access. To the extent that cost cannot be established, CBA proposes to derive the leased access rate by use of the arithmetic mean of all the implicit charges made to unaffiliated program suppliers for a given programming category, plus a five percent incremental charge.[31]

21. A home shopping programmer, ValueVision International, Inc. ("ValueVision"), believes that the implicit fee formula is unnecessary for home shopping channels because an explicit pattern of charges for home shopping programming already exists on non-leased access channels. ValueVision asserts that the existing market rate for non-leased access home shopping programming is the appropriate fee, and that this fee should not be added to the implicit fee for a total charge.[32] ValueVision further contends that use of the market rate alone will, as Congress intended, encourage the widest possible diversity of programming sources and competition in the delivery of video programming.[33]

22. With regard to the programmer categories adopted by the Commission, certain cable operators believe that categories are unnecessary. For example, Time Warner

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[29] Paradise Petition at 5-9; *see also* Ex Parte Letter to JoAnn Lucanik, Federal Communications Commission, from Matt York, President, Videomaker, Inc. (June 20, 1994).

[30] SUR Petition at 6.

[31] CBA Petition at 3.

[32] ValueVision Petition at 2-5; *see also* Ex Parte Letter to William F. Caton, Acting Secretary, Federal Communications Commission, from Christopher M. Heimann, counsel for ValueVision International, Inc. (May 10, 1994) (stating that home shopping commissions are about 8 to 11 cents per subscriber); CME Opposition at 7 (stating that a home shopping explicit fee is approximately 5 to 12 cents per subscriber).

[33] ValueVision Petition at 5.

Entertainment Company, L.P. ("Time Warner"), supports elimination of the existing three categories on the grounds that differences in programming do not justify different rates. Time Warner believes that the value of each leased access channel "is the opportunity cost imposed on the operator from the lost chance to program these channels."[34] Therefore, Time Warner argues, the operator should be able to charge the highest implicit fee for all of its non-leased access programming. Cablevision Industries Corporation, et al. ("CVI"), states that, with the possible exception of per-event and per-channel programming, there is no compelling reason or legal basis for establishing classes of programmers. According to CVI, the distinctions only serve to subsidize underfunded programmers.[35]

23. On the other hand, programming interests assert that further refinement of the programmer categories is necessary. CME, for instance, supports establishment of still more categories. CME states that combining per-event and per-channel programming leads to absurd results, and that the "all other" category will not result in affordable rates for most programmers because it lumps programmers together that face different economics. This is especially true, CME asserts, with regard to advertiser-supported and non-advertiser supported programming.[36] SUR argues that further refinement of the categories is "absolutely essential" if leased access is to succeed in improving diversity and competition in cable programming.[37] Paradise asks the Commission to establish a separate category for advertiser-supported programmers.[38] Two home shopping programmers take opposite positions on this issue: the Home Shopping Network, Inc. ("HSN"), supports elimination of the separate category for direct sales programming, while ValueVision opposes its elimination based on the fundamentally different economics of the home shopping market.[39]

3. Discussion

a. Statutory Objectives

24. Many of the parties seeking reconsideration of the Commission's maximum rate formula generally contend that the existing rate formula results in rates that are too high. Their contention appears to be partially based on a belief that if channels are not in fact being leased up to the statutory requirement, or if the resulting rates render certain leased access

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[34] Time Warner Petition at 14.

[35] CVI Petition at 19; *see also* Booth Petition at 46-47.

[36] CME Petition at 6-8.

[37] SUR Petition at 13.

[38] Paradise Petition at 8-9.

[39] HSN Opposition at 2-4; ValueVision Opposition at 5.

services unprofitable or nonviable, then the rates are not reasonable and should be lowered until such time as more leasing occurs. This understanding of Congress' objectives in establishing the leased access channel requirement is, we think, incorrect. To the contrary, as long as the maximum leased access rate is reasonable, we believe that minimal use of leased access channels would not indicate that the rate should be lowered.[40]

25. The original objective of the leased access requirement as established by the 1984 Cable Act was not to deprive the system operator of the economic value it might otherwise extract from the channel, but to divorce the cable operator from editorial control over the content of the channel.[41] By amending the leased access requirement in the 1992 Cable Act, Congress added another objective: "to promote competition in the delivery of diverse sources of video programming." The Senate Report on the 1992 Cable Act states that, in addition to the First Amendment rationale behind the original leased access provision, the 1992 amendments were designed "to remedy market power in the cable industry" and to act as "an important safety valve for anticompetitive practices" by the cable operator.[42] The 1992 amendments did not, however, eliminate the purposes established by the 1984 Cable Act (i.e., to promote diversity of programming sources "in a manner consistent with growth and development of cable systems.")[43] The Commission must therefore seek to promote competition and diversity of programming sources on the one hand, as well as to further the growth and development of cable systems on the other.

26. These disparate policy goals are described further in the legislative history of the 1992 Cable Act. The 1992 House Report states that the Commission should set maximum reasonable rates in order to "make leased access a more desirable alternative for programmers"[44] and indicates that the Committee believed that the principal reason for leased access not being effective was that the original provisions empowered cable operators to control the price and conditions for use of leased access channels.[45] The 1992 Senate Report also indicates that rates are one reason that leased access has hardly been used, but states that "[t]he cable industry has a sound argument in claiming that the economics of leased access are

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[40] *See* 130 Cong. Rec. H10441 (daily ed. Oct. 1, 1984) (colloquy in House proceedings); 130 Cong. Rec. S14288 (daily ed. Oct. 11, 1984) (reference to colloquy in House proceedings).

[41] *See* 1984 House Report at 50-51.

[42] S. Rep. No. 92, 102d Cong., 1st Sess., (1992) (hereinafter "1992 Senate Report") at 30, 32.

[43] Communications Act, § 612(a), 47 U.S.C. § 532(a).

[44] 1992 House Report at 40.

[45] *Id.* at 39.

not conducive to its use."[46] These sections of the legislative history would seem to indicate that the goal for the Commission in setting maximum rates should be to lower rates. Yet, when Congress amended Section 612, it retained the provisions which state that the cable operator shall establish the price, terms and conditions for use of leased access channel capacity which are "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system" and such price, terms and conditions shall be presumed reasonable.[47] Therefore, the Commission is faced with balancing the needs of programmers with the needs of cable operators. As explained below, we believe that the cost/market rate formula described herein, appropriately balances those interests.

27. We do not believe that Congress intended that cable operators subsidize programmers who seek access to their system through the provisions of Section 612. Other provisions of law mandate that system operators provide access to channels for the distribution of communications without charge or at reduced rates, including channels for the distribution of local broadcast signals under the mandatory broadcast signal carriage rules and for public, educational, and governmental ("PEG") access. Leased access, however, was established as a separate requirement to promote competition between and diversity of programming sources. We believe that, by setting a maximum rate which covers the operator's quantifiable costs associated with leased access and allows the operator to recover a reasonable profit, our proposed cost/market rate formula, described below, would not require operators to subsidize leased access.

b. Problems with the Highest Implicit Fee Formula

28. We believe that our goal in determining a maximum reasonable rate should be to promote the statutory objectives of competition and diversity in programming sources without financially burdening the operators, rather than to develop a price that will necessarily be lower or higher than the highest implicit fee. We believe that, if the maximum rate for leased access is reasonable, the resulting demand for leased access channels will also be reasonable. It is in this context that the Commission is re-examining the highest implicit fee formula.

29. We believe that the highest implicit fee formula is likely to overcompensate cable operators and does not sufficiently promote the goals underlying the leased access provisions. First, the highest implicit fee appears to allow double recovery of subscriber revenues (or "double billing") by the operator. The implicit fee is based on the average per channel revenue for the tier on which the leased access programming will be carried. Thus, if the subscriber tier charge for a tier with 20 channels is $10, the average per channel revenue

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[46] 1992 Senate Report at 31-32.

[47] Communications Act, §§ 612(c)(1), 612(f), 47 U.S.C. §§ 532(c)(1), 532(f).

is $.50 (=$10/20). The channel with the highest implicit fee is the channel with the lowest programming charge (i.e., the lowest license fee). Continuing our example, if the programming charge is zero on one of these 20 channels, that channel would have the highest implicit fee equal to $.50. Allowing the operator to charge the leased access programmer the highest implicit fee of $.50 and then collect the $.50 again from the subscriber in the $10 tier charge is what is commonly referred to as "double billing." The highest implicit fee formula therefore permits the operator to recover revenues for carrying the programming once from the subscriber (included in the tier charge) and again from the programmer (included in the implicit fee).

30. Second, we are concerned that the highest implicit fee allows an operator to charge a leased access programmer a fee based on the channel with the highest markup over programming costs (i.e, the highest implicit fee). Because the implicit fee for many, if not most, non-leased channels is by definition less than the highest implicit fee, the operator is accepting less than the highest implicit fee from many non-leased access programmers. Charging the leased access programmer the highest implicit fee therefore is likely to overcompensate the operator compared to the amount the operator is willing to accept.

31. Third, we believe that the highest implicit fee formula is not based on the reasonable costs that leased access programming imposes on operators. When the set-aside requirement is not met, the rate should be high enough to recover all reasonable costs of leasing and a reasonable profit, but no higher. In this way, leased access is promoted without placing a financial burden on the operator. A higher rate unnecessarily discourages leased access and rewards operators who do not meet the set-aside requirement.

32. Given these limitations of the highest implicit fee, the Commission has developed an alternative proposal (which we refer to as the cost/market rate formula), that it believes may better promote the goals of leased access. However, because our proposed cost/market rate formula is a significant departure from the highest implicit fee formula, and to avoid any unintended consequences, we are not adopting the cost/market rate formula at this time and are instead seeking comment on our proposal in the *Further Notice* below. Because the cost/market rate formula is not being adopted at this time, the highest implicit fee will remain in effect in the interim period until our rules are revised.

c. Clarifications for Calculating the Highest Implicit Fee

33. Through the Commission's complaint process as well as this reconsideration proceeding, it has come to the Commission's attention that the highest implicit fee formula may be unclear in some respects. Because the highest implicit fee formula will continue to be in effect on an interim basis until new rules developed in response to the *Further Notice* become effective, we will clarify certain issues regarding the application of the highest implicit fee formula. We do not, however, believe that these clarifications will in any way solve the conceptual problems we perceive to be present with the highest implicit fee.

34. As a preliminary matter, we will modify Section 76.970(c) to correct certain errors contained therein so that the calculation of the implicit fee is clear and easy to follow. Specifically, the rule states that the subscriber revenue is deducted from the program license fee when, in fact, the program license fee is supposed to be deducted from the average subscriber revenue. We will therefore correct the language in the rule accordingly. We will also correct the title of Section 76.977 of the Commission's rules.[48]

35. In addition, we believe that the highest implicit fee calculation should not include the implicit fee for non-retransmission consent broadcast signal and PEG access channels in determining which channel has the highest implicit fee. For the carriage of local "must carry" broadcast signals, cable operators typically collect a fee from subscribers, but pay no direct charge for the programming. Because there is no sharing of subscriber revenues between the system operator and the programmer, the channel appears to be the most highly valued, i.e., the programmer is willing to permit the cable operator to retain the entire value of the channel and so these channels are often the basis for the highest implicit fee calculation. Because of the mandatory carriage rules and the compulsory copyright licensing system, this does not now seem to be a calculation that reflects a marketplace decision as to the value of the channel. Similarly, where an operator is required by the local franchising authority to carry PEG channels, the cable operator has not made a marketplace decision to carry the channels. Accordingly, we conclude that the implicit fee for each must carry broadcast signal channel and PEG access channel should not be considered for purposes of determining which implicit fee is the highest. These channels should, however, be used to determine the monthly average subscriber revenue per channel for all the channels on the tier.

36. Furthermore, we believe that operators should calculate the highest implicit fees on a tier-by-tier basis; that is, if the leased access channel is to be on the BST, the calculation of the highest implicit fee should be based on the BST channels, and, if the leased access channel is to be on a CPST, the implicit fees should be determined for the channels on that CPST.

37. We also clarify that programming revenues received by the operator from an unaffiliated programmer, as opposed to programming costs paid by the operator to the unaffiliated programmer, should not be included in the highest implicit fee calculation. In certain circumstances, such as with direct sales or "home shopping" channels, the programmer pays the cable operator a percentage of its revenues, rather than the operator paying the programmer a license fee. We did not address in the *Rate Order* whether these payments from the programmer to the operator should be added into the implicit fee calculation. We conclude that these payments should not be included because the highest implicit fee is

[48] 47 C.F.R. § 76.977.

intended to recover only the value of channel capacity and therefore should not include the value of services, such as marketing, other than the provision of channel capacity.[49]

38. We have also been asked to clarify how to compute the implicit fee on a per channel basis. The issue relates to whether the number of subscribers used in the calculation should be the current number of subscribers before a premium channel is leased or the number of subscribers on the premium channel who take the new leased access programming. We have been asked to permit leased access programmers who offer their programming on a per-channel or per-event basis to be allowed to multiply the per-subscriber rate by the number of subscribers who will receive their new service, rather than the number of subscribers that currently receive the non-leased access service.[50] Conversely, we have been asked to clarify that the per-subscriber fee in the highest implicit fee formula should be multiplied by the number of subscribers currently on the system, not the number of subscribers who will receive the new leased access service.[51]

39. The *Rate Order* specifies that the difference between the rate per month that the cable operator pays the programmer and the rate that the subscriber pays per month for the programming should be multiplied by the percentage of subscribers able to receive that channel or programming.[52] Neither the *Rate Order* nor our current rule explicitly states that this number must then be multiplied by the number of subscribers on the system. We will modify our rule to clarify that, for leased access programming on either the BST or a CPST, the highest per-subscriber implicit fee should be multiplied by the number of current subscribers who actually subscribe to the tier on which the leased access channel will be placed. However, for leased access programming in the per-channel/per-event program category, the highest per-subscriber implicit fee should be multiplied by the average number of subscribers that subscribe to the operator's premium services. Requiring the highest per-subscriber implicit fee to be multiplied by the actual number of subscribers to a leased access premium service would unfairly penalize the operator for low subscribership to the leased access programming. Using the average number of subscribers that subscribe to the operator's premium services derives an approximation that is equally fair for both the operator and the leased access programmer.

d. Provision of Rate Information

40. Section 76.970(e) of the Commission's rules provides that a schedule of commercial leased access rates shall be provided to prospective leased access programmers

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[49] *See* CSC Petition at 15 n.28.

[50] SUR Petition at 10. *But see* Time Warner Opposition at 3-4.

[51] Cablevision Systems Corporation ("CSC") Petition at n.26.

[52] *Rate Order*, 8 FCC Rcd at 5950-5951, ¶518.

upon request.[53] Our leased access complaint process has revealed that rate information is often not provided in a timely manner.[54] In an effort to facilitate the provision of leased access information to potential leased access programmers, we clarify that our intent in establishing this rule was to insure that the initial information a potential programmer might need to decide whether to pursue leased access be provided as soon as practicable. We will therefore modify our rule to require an operator to provide to a prospective leased access programmer within seven business days of such programmer's request: (a) a complete schedule of the operator's full and part time leased access rates; (b) how much of its set-aside capacity is available; (c) rates associated with technical and studio costs; and (d) if specifically requested, a sample leased access contract. We believe that operators should have this information readily available and therefore providing it to prospective programmers within seven business days will impose no hardship on operators.[55] Requests can be made by any reasonable means (in person, by telephone, by facsimile, or by mail), and the information will be deemed provided when the operator sends or gives the information to the programmer. Because this information must be provided within seven business days of the request, operators may not require that prospective programmers first provide any information (e.g., fill out an application) before the information listed above is provided. In this context, we affirm that, as stated in the *Rate Order*,[56] the Commission has the authority to, among other things, issue forfeitures for violations of the leased access statute and rules. Failure to provide the above information within the seven business day period will constitute a violation of our rules.

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[53] 47 C.F.R. § 76.970(e).

[54] The operator's failure to provide rate information is one of the most frequent complaints filed by programmers seeking leased access.

[55] In addition, we note that cable operators are required, under the Commission's customer service standards and the National Cable Television Association's voluntary standards, to perform standard installations within seven business days, and, under the Commission's amended home wiring rules, operators will be required to remove home wiring within seven business days. *See* 47 C.F.R. § 76.309(c)(2); *Notice of Proposed Rulemaking* in MM Docket No. 92-263, 7 FCC Rcd 8641, 8643-44 (1993); *First Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 92-260, FCC 95-503, released January 26, 1996 (amending 47 C.F.R. § 76.802(a)). We believe it is reasonable to allow seven business days simply to provide information to a leased access programmer.

[56] *See Rate Order*, 8 FCC Rcd at 5959, ¶ 535.

B. Part-Time Rates

1. Background and Petitions

41. The *Rate Order* stated that maximum rates for leasing less than a full-time channel could be calculated by prorating the monthly maximum rate.[57] The *Rate Order* did not, however, address whether operators would be permitted to charge higher rates for part-time use during more desirable "prime time" viewing hours. In *TV-24 Sarasota, Inc. v. Comcast Cablevision of West Florida, Inc.*, for example, the Cable Services Bureau stated that such time of day pricing is permitted.[58]

42. While the majority of cable operators that filed in this reconsideration proceeding assert that the highest implicit fee approach is fair when it is applied to full-time channel leasing, some operators challenge adoption of the highest implicit fee formula on the grounds that the resulting rates may not allow operators to recover all of their costs[59] and do not account for the value of services to subscribers.[60] Several cable operators complain that the highest implicit fee results in part-time rates that are too low. For example, Bend Cable Communications, Inc., et al. ("Bend"), and Continental Cablevision, Inc. ("Continental"), argue that the highest implicit fee approach is fair, but that part-time leases invite abuse due to unusually low cost hourly rates that do not reflect the value of certain time slots or the additional administrative, technical and lost-opportunity costs of part-time leases.[61] Others agree that a straight proration for part-time use produces artificially low rates and that such proration will not cover costs.[62] Bend recommends that the implicit fee be used for part-time leases only if no "market" rate exists, while Cablevision Systems Corporation ("CSC") proposes that the uniform maximum part-time leased access rate should be one cent per subscriber per hour.[63] Other operators contend that a straight proration of the maximum rate for leased access ignores the different values that different day-parts have and that part-time rates would be appropriate if operators were allowed to charge different rates for different

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[57] *Id.* at 5950-5951, ¶ 518.

[58] 10 FCC Rcd 3512 (Cable Serv. Bur. 1994); *see also TV-24 Sarasota, Inc. v. Paragon*, 10 FCC Rcd 991 (Cable Serv. Bur. 1994).

[59] *See, e.g.*, Booth Petition at 45.

[60] *See, e.g.*, Comcast Petition at 19; Time Warner Petition at 34.

[61] Bend Opposition at 2, 7; Continental Petition at 22-24.

[62] CSC Petition at 13; Booth Petition at 47.

[63] Bend Opposition at 9; CSC Petition at 16.

times of day.[64] CME states that it does not oppose "de-averaging" lease rates to account for the value of prime time.[65]

2. Discussion

43. Although the statute does not specifically address the question of rates for part-time use, our initial rules permit prorating the maximum monthly rate as one method of deriving rates for shorter periods. The only restriction on cable operators' rates under the current rules is that they may not exceed the maximum monthly rate as calculated on a monthly basis from the highest implicit fee. We also recognize that the media industry places different values on the different hours of the day in recognition of the different values that different hours of the day have in the television marketplace (i.e., "prime time" and "non-prime time").

44. We therefore affirm the Cable Services Bureau's rulings in the *TV-24 Sarasota* cases referenced above and will not construe our rule as requiring a cable operator to adhere to a rigid formula for determining its hourly leased access rate by prorating its maximum rate for a full-time channel into equal hourly amounts. We conclude that cable operators may charge different time-of-day rates, provided that the total of the rates for a day's schedule (i.e., a 24 hour block) does not exceed the maximum rate for one day of a full-time leased channel (prorated from the monthly rate) and provided that the overall pattern of time of day rates is otherwise reasonable and not intended to unreasonably limit leased access use. A reasonable time-of-day rate structure that is appropriately related to time-of-day pricing in the media industry and does not frustrate leased access channel use would not conflict with our rules. We believe that this approach will recognize the generally different values for different time slots, and will further the statutory goal of promoting diverse programming sources, because programmers that could not afford rates based on uniform pro rata pricing may be able to afford lower non-prime time rates. In addition, allowing time-of-day part-time pricing may help promote full use of a designated channel by making non-prime time slots more attractive to programmers (i.e., less expensive), thus alleviating some of the need for operators to open new channels before current channels are fully utilized.[66]

45. Accordingly, the rules we adopt on reconsideration provide that operators may establish reasonable time-of-day pricing schedules. In order to ensure that operators' part-time rates do not exceed the maximum rate, we will require operators to establish a schedule of rates, or rate card, for different times of day, pursuant to which, if all times were used, the sum of the part-time charges for any single leased access channel within a 24-hour period

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[64] *See* Bend Opposition at 7; Booth Petition at 47-48; Comcast Petition at 21-22; Continental Petition at 22-24; CSC Petition at 12-16.

[65] CME Opposition at 11.

[66] *See* Section IV.E. below.

would not exceed its maximum rate for the leased access channel if the daily rate were prorated evenly from the monthly maximum rate and were calculated in accordance with Section 76.970 of our rules. The *Further Notice* below requests comment on whether proration generally and time of day pricing specifically are appropriate methods for determining part-time rates under the proposed cost formula.

C. Time Increments

46. In the *Rate Order*, we concluded that cable operators should be required to accommodate leases of any time increment (e.g., leasing an hour on a regular leased channel, leasing a whole channel, or leasing for use a subscription service) in a reasonable manner because neither Section 612, its legislative history nor the record indicated any reason to prevent part-time leased access.[67] Some cable operators have requested that we require leased access on a full-time, full-channel basis only.[68] Comcast Cable Communications, Inc. ("Comcast"), expressed concern that trying to accommodate one hour leases will leave channels underutilized and will be burdensome to negotiate.[69]

47. On reconsideration, we reaffirm our conclusion that cable operators should be required to accommodate both full and part-time leases. This conclusion is consistent with Congress' intent that leased access provide programmers a "genuine outlet" for their product.[70] We recognize the legitimate concern of cable operators that negotiating contracts for numerous small time intervals may be an administrative and financial burden, which the proposed cost formula takes into account. As a practical matter, however, the most common programming time increment is typically one half to one hour. Imposing a full-time only requirement could effectively preclude most leased access programmers from obtaining access. Thus, in order to balance these competing interests, we will not require operators to accept leases which are for less than a one-half hour interval. This requirement will allow programmers to lease time in relatively small increments, but will avoid the administrative burden of providing leased access in very small increments, such as one or two minutes. Although not required to do so, operators may accept requests for less than one-half hour.

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[67] *Rate Order*, 8 FCC Rcd at 5939 n.1277.

[68] Booth Petition at 47-48; Continental Petition at 22-24.

[69] Comcast Petition at 21-22.

[70] 1992 Senate Report at 79.

D. Billing and Collection Services

1. Background

48. Section 612(c)(4)(A)(ii) of the statute requires the Commission to establish reasonable terms and conditions for billing of rates to subscribers and for the collection of revenue from subscribers for leased access channels.[71] The subscriber revenue at issue here does not include revenue generated from the sale of products promoted on leased access programs (e.g., home shopping programs or infomercials). In the *Rate Order*, we required cable operators to provide billing and collection services to leased access programmers unless operators could demonstrate the existence of third party billing and collection services which, in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered to comparable non-leased access programmers.[72] We did not adopt rules governing the rates for billing and/or collection services. We stated that competition, where it exists in the provision of these services, will set an upper limit on charges by cable operators.[73] If a dispute arises, however, we stated that we will address what constitutes a maximum rate for billing and collection on a case-by-case basis, bearing in mind the statutory objectives and individual circumstances, such as the number of subscribers to be billed, implicit charges to non-leased access services for comparable billing and collection, and prices charged by competitive billing and collection providers.[74]

2. Petitions

49. Cable operators argue that there is no statutory obligation to provide billing and collection services to leased access programmers.[75] They maintain that the statute only requires that those operators who choose to provide such services must do so at rates consistent with the maximum rates established by the Commission. They also argue that there are many third party providers of billing and collection services in the marketplace, such as credit card companies. Other petitioners argue that the Commission must require operators to provide billing and collection services in order to ensure the viability of leased access programming.[76] CME also argues that the Commission should regulate the rates for these services because if no competition exists for billing and collection services, the cable operator

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[71] Communications Act, § 612(c)(4)(A)(ii), 47 U.S.C. § 532 (c)(4)(A)(ii).

[72] 8 FCC Rcd at 5943-5945, ¶¶ 503-504.

[73] *Id.* at 5945, ¶ 505.

[74] *Id.*

[75] Booth Petition at 48-49; Comcast Petition at 22-24.

[76] CME Opposition at 7-9; Videomaker Opposition at 5-6.

has no incentive to charge competitive rates and may charge higher rates if it views the lessee as a competitor or it would otherwise prefer not to put the lessee on its system.[77]

3. Discussion

50. We find that the arguments raised by petitioners on this issue were fully considered and rejected in the *Rate Order* and need not be analyzed again.[78] The record before us now, as in the *Rate Order*, contains little specific data on the existence of, or information about, competitive providers of billing and collection services, except to state that there are credit card companies in the marketplace that provide such services. We note that the mere existence of third party billing and collection providers does not relieve the operator of its obligation to provide these services. Rather, the critical issue is whether, in terms of cost and accessibility, these alternatives are substantially equivalent, to what the operator offers non-leased access programmers. Operators have not demonstrated to us that such alternatives exist to such an extent that we should change our requirements adopted in the *Rate Order*. We remain convinced, therefore, that pursuant to Section 612(c)(4)(A)(ii), we have the authority to require cable operators to provide billing and collection services for leased access cable programmers and that there is a need for cable operators to provide such services.

51. In the *Rate Order*, we did not adopt specific rules relating to the rates that might be charged for billing and/or collection services. We stated that competition, where it exists, in the provision of services of this type will set an upper limit on charges by cable operators.[79] On reconsideration, we do not believe that the adoption of specific rate rules at this time is warranted. Cable operators should have the incentive to quote reasonable and competitive rates in order to obtain the additional revenues that billing and collection services could generate for them. As we stated in the *Rate Order*, if a dispute arises, we will address what constitutes a maximum rate for billing and collection services on a case-by-case basis.[80]

E. Security Deposits

52. In the *Rate Order*, we agreed with cable operators that they should have discretion to require reasonable security deposits or other assurances from programmers that are unable to prepay in full for leased access channel capacity.[81] We agreed that it would be

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[77] CME Petition at 14.

[78] *Rate Order*, 8 FCC Rcd at 5944-5945, ¶¶ 504-505.

[79] *Id.* at 5945, ¶ 505.

[80] *Id.*

[81] *Id.* at 5942-5943, ¶ 501.

unfair to require operators to bear the financial risk of carrying leased access programming without the provision of suitable guarantees. We further stated that our rules would strive to preserve the financial integrity of the operator by allowing for flexible negotiations between the parties.[82] CME states in its petition for reconsideration that, while we have held that cable operators should have the discretion to require reasonable security deposits, we have failed to define the term "reasonable." CME maintains that defining this term is particularly important because, if the security deposit is too high, it can create a barrier to entry onto a system and defeat the purpose of the leased access provisions.[83]

53. On reconsideration, we decline to set specific monetary guidelines in this area and believe that it is sufficient to state that the term "reasonable" should be interpreted in relation to the objective of such a deposit. That is, it should be sufficient to insure the payment of lease rates, without discouraging leased access. As we indicated in the *Rate Order*, this approach will allow for flexible negotiations between the parties. We will, however, clarify that operators may not demand a security deposit for channel time from a programmer that pays the full rate in advance. If carriage is not purchased for discreet or individual time spots, but is leased on a full-time or periodic basis, the full rate will be considered the full monthly rate (or whatever period of time is relevant if the programming is periodic). Determinations of what is a "reasonable" security deposit will be made on a case-by-case basis, taking into consideration the past relationship between the operator and the programmer, the amount of time to be leased, the credit history of the leased access programmer, the operator's practices with respect to security deposits in other, similar contexts, and any other relevant factors.

F. Calculation of Statutory Set-Aside Requirements

54. As indicated, Section 612 of the Communications Act requires a cable system to set aside up to 15 percent of its activated channels for leased commercial access. The statutory set-aside requirements for leased commercial access channels are expressed as a percentage of "channels not otherwise required for use by federal law or regulation."[84] The *Rate Order* did not specify what channels are considered as required for use by federal law or regulation.

55. We clarify that, for purposes of calculating the set-aside requirements, only must-carry channels are excluded, as these channels are required for use by federal law. Retransmission consent and PEG channels, on the other hand, are not required by federal law, although federal statutory provisions permit local authorities to require operators to provide

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[82] *Id.*

[83] CME Petition at 15-16.

[84] Communications Act, § 612(b)(1), 47 U.S.C. § 532(b)(1).

PEG channels and also require operators to obtain retransmission consent in some cases.[85] Our conclusion is directly supported by the legislative history of the 1984 Cable Act, which specifically addresses this point, stating that

> [PEG] channels, since they are not expressly required by federal law, are not subtracted from the total system's channel capacity in determining to what number the mandated percentage is applied.[86]

This same rationale applies to retransmission consent channels, in that they also are not expressly required by federal law. Therefore, we determine that retransmission consent and PEG channels will be included among activated channels for purposes of determining a systems' leased access set-aside requirements.

G. Reporting Requirements

1. Background

56. In the *Rate Order*, we observed that, because few programmers had exercised their option to lease access since 1984, it is important to monitor the leased access market and to make timely adjustments to the rules if necessary.[87] We noted, however, that the reporting requirements outlined in our initial *Notice of Proposed Rulemaking* (*Notice*) drew little comment.[88] These proposed requirements included collecting information on the following: channel capacity required to be designated for leased use; percentage of set-aside capacity used; percentage used by not-for-profit programmers; and actual rates charged leased access users.[89] Instead of adopting these specific reporting requirements, we stated that we would

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[85] A retransmission consent channel is a broadcast station which is carried by the cable operator pursuant to a written agreement authorizing the operator to carry that station's signal. *See* 47 U.S.C. § 614. Section 611 of the Communications Act authorizes franchising authorities to establish requirements in a franchise with respect to the designation or use of channel capacity for PEG channels.

[86] 1984 House Report at 48.

[87] *Rate Order*, 8 FCC Rcd at 5956, ¶ 530.

[88] *Id.* at 5955, ¶ 528. A small number of commenters were in favor of some form of reporting requirement for cable operators. Cable operators observed that there was no generally available leased access information and stated that the collection of leased access data over the next several years would be helpful for determining the reasonableness of rates and the feasibility of developing a benchmark for leased access. Consumer and media advocacy groups supported a reporting requirement for monitoring purposes. *Id.*

[89] *Id.* at 5954, ¶ 527.

incorporate mechanisms for obtaining specific leased access information into our general reporting and monitoring process.[90] Currently, the only official source for leased access information is the Annual Report of Cable Television Systems (FCC Form 325), which asks operators whether they are leasing any channels.

2. Petitions

57. In general, we received little comment from petitioners regarding leased access reporting requirements. CME advocates that the Commission adopt specific reporting requirements to ensure that Congress' goals for leased access are fulfilled.[91] Specifically, CME urges the Commission to reconsider implementing the kind of data collection suggested in the *Notice*.[92] CME also urges the Commission to require operators to file a rate schedule, along with supporting materials, on an annual basis.[93]

58. CME's proposal, particularly its suggestion that operators file materials supporting calculation of their rates, is opposed by cable operators.[94] Time Warner argues that a requirement that all information supporting the calculation of an operators' highest implicit rates be made public would cause the cable industry to suffer by giving competitors the ability to gain access to proprietary information and thereby decrease competition.[95] It states that the Commission has recognized that this type of information should be maintained as confidential when submitted to the Commission pursuant to Sections 0.457, 0.459 of the Commission's Rules.[96] CVI argues that a reporting requirement would violate the

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[90] *Id.* at 5956, ¶ 530.

[91] CME Petition at 23-24.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 23-24.

[95] Time Warner Reply at 9.

[96] *Id.* at 10. Section 0.457, which designates Commission records that are not routinely available to the public, does not expressly include contracts between cable operators and programmers. Section 0.459 allows parties submitting information to request confidentiality with respect to specific portions of the material and make a showing, by a preponderance of the evidence, that non-disclosure is consistent with the Freedom of Information Act, 5 U.S.C. § 552.